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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCO ANTONIO SANDOVAL,

Defendant and Appellant.

D074364

(Super. Ct. No. JCF36531)

APPEAL from a judgment of the Superior Court of Imperial County,
Christopher J. Plourd, Judge. Affirmed.

Benjamin B. Kington, under appointment by the Court of Appeal, for Defendant
and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Steven T. Oetting and Warren J.
Williams, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

Defendant Marco Antonio Sandoval appeals from a judgment ordering execution of a previously suspended five-year prison sentence following the revocation and termination of his probation.

Sandoval asserts that the trial court abused its discretion in revoking and terminating his probation because, he contends, the trial court erroneously believed that it was required to find the existence of "unusual circumstances" before it could reinstate his probation.¹ Assuming that it would be erroneous for a court to apply this standard in the context of determining whether to reinstate probation after finding a violation, we conclude that the court did not apply this standard here. The record demonstrates that when the court initially indicated its intention to apply this standard, defense counsel informed the court that the "unusual circumstances" standard applied only to the initial decision whether to grant a defendant probation. After defense counsel offered this correction, the court proceeded to exercise its discretion with respect to whether to revoke Sandoval's order of probation and commit him to prison for the term previously imposed and stayed without further reference to "unusual circumstances." We therefore reject Sandoval's contention that the court applied an incorrect standard, i.e., whether "unusual

¹ Penal Code section 1203, subdivision (e) creates a presumption against the initial granting of probation to certain persons identified in that provision "[e]xcept in unusual cases where the interests of justice would best be served if the person is granted probation."

circumstances" existed that warranted reinstating probation, prior to revoking and terminating Sandoval's probation and ordering execution of the suspended sentence. We affirm the judgment.

II.

BACKGROUND

The Imperial County District Attorney charged Sandoval with one count of corporal injury to a cohabitant that resulted in a traumatic condition and occurred within seven years of a previous conviction under 273.5 (count 1; Pen. Code,² § 273.5, subd. (f)(1)), and one count of making criminal threats to the same victim (count 2; § 422, subd. (a)). The information also alleged that Sandoval had suffered two prior prison term convictions (§ 667.5, subd. (b)) and two prior strike convictions (§§ 667, subds. (b)–(j), 1170.12).

Sandoval entered a plea of nolo contendere to count 1 and admitted one of the prior prison term convictions. The plea agreement included a stipulated five-year suspended sentence, with three years of felony probation and credit for time served, in exchange for the dismissal of the remainder of the charges and allegations.³

² All further statutory references are to the Penal Code unless otherwise indicated.

³ Sandoval's nolo contendere plea did not provide the particulars of the underlying offense. However, the probation report states that Sandoval struck his wife in the mouth with a closed fist and then put her in a headlock. He told her that she was never going to leave him and that he would kill her if she did. Sandoval choked his wife until she lost consciousness.

At the sentencing hearing in October 2016, the trial court sentenced Sandoval in accordance with the plea agreement, imposing a sentence of five years in state prison, suspending execution of that sentence and placing Sandoval on probation for three years. The court set a number of conditions of probation, including a requirement that Sandoval enroll in an anger management class and provide proof of enrollment, and that he notify the probation department of any changes to his address or telephone number.

In May 2017, a petition was filed alleging that Sandoval had violated the terms of his probation and a bench warrant was issued for his arrest. The initial petition alleged multiple violations, including: (1) that Sandoval had been terminated from his anger management program due to absences; (2) that he had been discharged from his reentry program for noncompliance; (3) that he had failed a drug test, testing positive for methamphetamines; and (4) that he had failed to report to his probation officer and a probation officer had been unable to contact him either by telephone or in person at his last reported address. An amended petition for revocation was filed in June 2018; the amended petition alleged a fifth violation, i.e., that upon being contacted by police officers, Sandoval attempted to evade officers, which led to him being charged with resisting a peace officer.

At the hearing regarding the alleged violations of probation, the People elected to proceed on allegations 1 and 4 of the revocation petition. After the trial court heard testimony from a counselor who worked at the anger management program from which Sandoval had been terminated and from Sandoval's probation officer, the court found that Sandoval had violated the terms of his probation.

At the conclusion of the proceedings, the trial court terminated Sandoval's probation, and ordered execution of the previously-imposed but suspended five-year prison sentence.

Sandoval filed a timely notice of appeal.

III.

DISCUSSION

Sandoval contends that the trial court abused its discretion when it declined to reinstate him on probation, because, according to Sandoval, the court erroneously believed that it was required to find "unusual circumstances" in order to reinstate him on probation, and for this reason, applied a presumption against the reinstatement of probation.

A. Additional procedural background

During the hearing regarding the alleged probation violations, a counselor from Sandoval's anger management program testified that Sandoval had been terminated from the program after he failed to appear on more than three occasions. Sandoval's probation officer also testified that officers within the probation department had attempted to contact Sandoval at his residence and by telephone several times, but had been unsuccessful in making contact with Sandoval. In April 2017, probation officers attempted to contact Sandoval at the residence address that they had on file for him and discovered that the residence was occupied by a new tenant. At the time of the probation violation hearing, Sandoval had not been in contact with the probation department for over a year.

The trial court noted that Sandoval had previously been ordered to appear and show proof of continued progress in his anger management program, but had failed to appear to provide that proof. The trial court further noted that at that point in time, when Sandoval had been ordered to appear and had failed to show, the court had summarily revoked Sandoval's probation and issued a warrant for his arrest.

After considering the testimony provided at the probation revocation hearing, the trial court determined that Sandoval had violated the condition requiring that he attend a 52-week certified anger management program and had also violated the condition requiring that he report to the probation department.

Before imposing sentence, the trial court indicated that it had reviewed the original probation officer's report after having reviewed the supplemental probation report.

Addressing defense counsel, the trial court then stated,

"Based upon his record, the number of convictions, probation can only be granted if there's unusual circumstances. That wasn't specifically addressed [in the supplemental probation report]. Although, the factors that would apply to that were adequately covered in both probation reports. It appears that probation initially, because that was the agreement, suspended the five-year upper term sentence. That was agreed to. But in order to grant probation at this juncture, I would have to make a finding of unusual circumstances. So I'd like you to address your comments as to that."

Defense counsel immediately responded, "Well, I guess at the outset what I will say, I think that the requirement about probation being granted under unusual circumstances. I disagree with the Court's interpretation of that statutory scheme. I think that a[n] initial grant of probation requires a finding of unusual circumstances, which the sentencing court in this case found. I don't think there's any law that says unusual

circumstances apply to a reinstatement on probation. I think it's very clear it's the initial grant of probation." Defense counsel proceeded to argue why Sandoval should be reinstated on probation, noting that Sandoval suffered "from a debilitating drug addiction, one conviction after another where drugs are involved," and suggesting that he be permitted to attend a residential drug treatment program.

The prosecutor responded, stating that in his view, in addition to having a problem with drugs, Sandoval's record also demonstrates that he "[h]as an extreme issue with violence, almost more than he has an issue with drugs." The prosecutor proceeded to enumerate Sandoval's lengthy criminal history of violent offenses and weapons offenses. The prosecutor also pointed out that Sandoval "knew [that he] took a five-year upper term suspended sentence and then on the first violation," of probation, despite being fully aware of the potential that he might serve that time in prison, Sandoval had "failed to report" and "failed to do the anger management that was very easy for him to do and just decided he didn't care about that upper term sentence and absconded for a year." The prosecutor argued that the "only appropriate remedy at this juncture is to impose that upper term suspended sentence because that's the only thing that will make a difference."

Sandoval was provided an opportunity to address the court. He told the court that he knew that he had "violated probation and I did sign for the deal," and added that he "need[ed] help with [his] drug case."

After the attorneys and Sandoval had spoken, the trial court began to state its ruling, noting that "this is a troubling case" and indicating that the court had "spent some time looking at all of the aspects of it." The court stated that it appreciated that Sandoval

appeared to have begun to understand that he has a drug problem. The court continued, stating that "[t]he thing that tips the scale here as far as what the Court is going to do is really the length of time that the issues — Mr. Sandoval['s] record[] goes back to 1988, and there are just too many issues where violence creeps up." The court acknowledged that many of Sandoval's issues are related to his drug use, and then said, "But I think I have to balance things out. And having him on probation has not worked. Having him on parole has not worked, he's been noncompliant, committing new crimes, committing violent crimes while he's on probation and/or parole for 20 years. [¶] So I just don't feel that probation monitoring is going to do any — is going to be successful." The court later stated, "So the question is how to best protect the public," and in that regard, the court concluded that although for many people the public's interest would be to "get people help that need help" with drugs, "with Mr. Sandoval I just think nothing has worked." The court concluded, "I just can't come to the conclusion that he's a [g]ood candidate for probation. I think if he gets a residential placement he'll be out of it and on the lam again."

The court denied Sandoval's request to be reinstated on probation and ordered execution of the suspended five-year prison term.

B. Relevant legal standards

"At any time during the period of supervision of a person . . . released on probation under the care of a probation officer . . . if any probation officer . . . has probable cause to believe that the supervised person is violating any term or condition of his . . . supervision, the officer may . . . bring [the supervised person] before the

court Upon rearrest . . . the court may revoke and terminate the supervision of the person if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation . . . officer . . . that the person has violated any of the conditions of his . . . supervision." (§ 1203.2(a).) Thus, a trial court may revoke an order of probation at any time during the probationary period upon a finding that the defendant has not complied with the terms of the probation. (*People v. Urke* (2011) 197 Cal.App.4th 766, 772.) "[T]he facts supporting revocation of probation may be proven by a preponderance of the evidence." (*People v. Rodriguez* (1990) 51 Cal.3d 437, 439, 447.)

"A probation violation does not automatically call for revocation of probation and imprisonment. [Citation.] A court may modify, revoke, or terminate the defendant's probation upon finding the defendant has violated probation. (§ 1203.2, subs. (a), (b)(1).) . . . [U]pon finding a violation of probation and revoking probation, the court has several sentencing options. [Citation.] It may reinstate probation on the same terms, reinstate probation with modified terms, or terminate probation and sentence the defendant to state prison. [Citations.] [¶] If the court decides to reinstate probation, it may order additional jail time as a sanction. [Citation.] If, instead, the court decides to terminate probation and send the defendant to state prison, . . . [and] if the court originally imposed a sentence and suspended execution of it, . . . the court must order that imposed sentence into effect. [Citations.]" (*People v. Bolian* (2014) 231 Cal.App.4th 1415, 1420–1421, italics omitted (*Bolian*).)

"[W]hen a judge suspends execution of a prison term, the message being conveyed is that the defendant is on the verge of a particular prison commitment. Nonetheless, upon violation and revocation of probation under such circumstances, the sentencing court retains discretion to reinstate probation." (*People v. Medina* (2001) 89 Cal.App.4th 318, 323; see Cal. Rules of Court, rule 4.435(a) ["When the defendant violates the terms of probation . . . or is otherwise subject to revocation of supervision, the sentencing judge may make any disposition of the case authorized by statute"].)

The decision to reinstate or decline to reinstate probation is a discretionary sentencing choice. (See *Bolian, supra*, 231 Cal.App.4th at p. 1420.) A defendant is entitled to a sentence that reflects the trial court's exercise of discretion based on legally permissible factors. (See *People v. Jones* (2007) 157 Cal.App.4th 1373, 1383.) " '[A]n abuse of discretion arises if the trial court based its decision on impermissible factors [citation] or on an incorrect legal standard.' [Citation.]" (*Wade v. Superior Court* (2019) 33 Cal.App.5th 694, 709.)

C. Analysis

The record demonstrates that immediately after the trial court indicated that it believed that it would have to find "unusual circumstances" before it could reinstate probation and noted that the supplemental probation report did not address that issue, defense counsel objected to the court's application of that standard. After defense counsel noted that a finding of "unusual circumstances" was required only for an initial grant of probation and not for reinstatement of probation, neither the court nor the prosecutor expressed any disagreement with defense counsel's assertion. Further, the trial

court never mentioned "unusual circumstances" again and proceeded to discuss appropriate legal considerations with respect to whether to terminate Sandoval's probation and impose the previously suspended sentence.

The trial court's statement of its reasons for terminating probation supports the conclusion that the court heeded defense counsel's assertion that a finding of unusual circumstances was not required in order to reinstate probation. The trial court provided several reasons for terminating probation—reasons that focused on the "interests of justice" and Sandoval's utter failure to comport with the terms of probation. (See § 1203.2, subd. (a) ["the court may revoke and terminate the supervision of the person *if the interests of justice so require* and the court, in its judgment, has reason to believe from the report of the probation or parole officer or otherwise that the person has violated any of the conditions of his or her supervision, has become abandoned to improper associates or a vicious life, or has subsequently committed other offenses" (italics added)].)

Specifically, the trial court observed that Sandoval's criminal history showed a clear nexus between his drug use and his repeated acts of violence. The court noted that probation and parole opportunities had not worked for Sandoval for the past 20 years, and, in fact, "nothing has worked." The court also considered the public's interest in safety, and opined that residential placement would simply result in Sandoval disappearing again. Throughout the court's statement of its reasoning, the court made no additional mention of "unusual circumstances" or otherwise indicated that it believed that there was a presumption against reinstatement of probation. Thus, to the extent that the

court may initially have been under the misimpression that there is a presumption against reinstating probation, and that the court would have to find that unusual circumstances existed before it could reinstate probation, the record does not support the conclusion that the court ultimately applied such a presumption.

On this record, we conclude that the trial court properly terminated Sandoval's probation and ordered the execution of Sandoval's suspended sentence, appropriately exercising its discretion and determining that the interests of justice required such a result in this case.

IV.

DISPOSITION

The judgment of the trial court is affirmed.

AARON, Acting P. J.

WE CONCUR:

DATO, J.

GUERRERO, J.